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No. 01-964

IN THE

Supreme Court of the United States

PENNZOIL COMPANY AND SUBSIDIARIES,
Petitioner,

v.

DEPARTMENT OF REVENUE,
STATE OF OREGON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Pursuant to Rule 37 of the Rules of the Supreme Court, Tax Executives Institute, Inc. respectfully submits this brief as *amicus curiae* in support of Petitioner.[1] Tax Executives Institute (hereinafter "TEI" or "the Institute") is a voluntary, nonprofit association of corporate and other

[1] Pursuant to Rule 37.6, *amicus* TEI states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Tax Executives Institute has received the written consents of Petitioner and Respondent to the filing of this brief; those consents have been filed with the Clerk of the Court.

business executives, managers, and administrators who are responsible for the tax affairs of their employers. The Institute was organized in 1944 and currently has approximately 5,300 members who represent more than 2,700 of the leading businesses in the United States, Canada, and Europe, nearly all of which are engaged in interstate commerce. TEI is dedicated to promoting the uniform and equitable enforcement of the tax laws and to reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers, and to vindicating the due process and Commerce Clause rights of business taxpayers.

The members of the Institute represent a cross-section of the business community in North America, and the multi-jurisdictional companies represented by the Institute's membership are significantly affected by the rules governing the allocation and apportionment of income among the various States. As a result, nearly all the Institute's members will be affected by the final result in this case. If the Oregon Supreme Court's decision stands, business taxpayers throughout the Nation will suffer from increased uncertainty, the enhanced potential for duplicative taxation, and the unavoidable cost and burden of compliance.

The issue in this case is simply this: Whether respondent violated the Due Process and Commerce Clauses of the U.S. Constitution when proceeds received by Pennzoil Company in settlement of a tort case having no connection to the State of Oregon were determined to be business income subject to apportionment for purposes of determining Pennzoil Company's Oregon tax liability. The constitutional rights of many if not most companies represented by TEI members are implicated and, indeed, threatened by Oregon's determination. The absence of guidance on the States' ability to tax extraterritorial income by categorizing extraordinary gains as apportionable business income—compounded by the Court's

declining to review three recent cases, *Deluxe Corp. v. Franchise Tax Bd.*, No. A088142 (Cal. Ct. App. 2001), *cert. denied*, 534 U.S. ____ (Jan. 7, 2002) (No. 01-603); *Hoechst Celanese Corp. v. Franchise Tax Bd.*, 106 Cal. Rptr. 2d 548 (2001), *cert. denied*, 534 U.S. ____ (Nov. 11, 2001) (No. 01-265); and *Kroger Co. v. Kansas Dep't of Revenue*, 270 Kan. 148 (2000), *cert. denied*, 532 U.S. ____, 121 S. Ct. 1736 (2001)—imperils all taxpayers. At stake in this case is no less than whether any real constitutional limit exists to the taxing power of the States. If a payment received in settlement of the then-largest jury award for tort damages stemming from interference in a failed capital transaction stands as apportionable business income, then what transaction is not subject to apportionment? History teaches that other States will follow suit, pouring their interpretative new wine into the old wineskins of seemingly constitutional statutes until any protections afforded by the Constitution have burst apart at the seams.

As the individuals who must contend daily with the interpretation and administration of tax laws across the country and globally, TEI members and the businesses by which they are employed will be materially affected by the Court's decision whether to review this case. Therefore, the Institute's interest in the outcome of this case is vital.

SUMMARY OF ARGUMENT

1. This case involves the limitations on the States' power to apportion income of a nondomiciliary taxpayer where that income bears no, or only a nominal, connection with the taxpayer's activities in the State. Under the Commerce Clause and Due Process Clause of the Constitution, a State may not tax value earned outside its borders. *ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 315 (1982). The State of Oregon's attempt in this case to tax income received

from a transaction that had absolutely no connection to activities within its borders should fail and, accordingly, the decision below should be reversed.

2. This is the latest in a series of cases to come to the Court on the question of what connection, or nexus, must exist between a State and a nondomiciliary taxpayer's income from out-of-state sources or activities before that income can be apportioned to, and therefore taxed by, the State. The general permissibility of formulary apportionment, however, should not obscure the Constitution's limitation on States' ability to tax out-of-state income. Although having discretion, no State has *carte blanche* in devising or applying its apportionment scheme.

The key to the Court's constitutional analysis has been the application of the unitary business principle, which focuses on whether the out-of-state item that the State is seeking to tax is "unitary" with, or functionally related to, that taxpayer's in-state activities. Hence, unless the unitary business principle is correctly applied, the apportionment formula employed by the State will most likely render a constitutionally impermissible result. If a State errs or overreaches in defining a taxpayer's unitary business—for example, by including nonapportionable items of income in or excluding apportionable items of expense from the tax base—its formula will violate constitutional norms. *Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 772-73 (1992) (striking down New Jersey's attempt to tax gain realized from a stock sale).

3. The overarching constitutional issue in this case is whether the State of Oregon's determination that proceeds received by Pennzoil Company in settlement of the then-largest jury award for tort damages is business income subject to apportionment does violence to the unitary business principle and hence contravenes the Commerce and Due Process Clauses by effectively taxing income beyond the State's constitutional reach.

4. Like many States, Oregon imposes a corporate excise tax for the privilege of doing business in the State, which starts with the corporation's federal taxable income and is modified to reflect the net income derived from or attributable to sources within the State. To promote uniform taxation of interstate businesses and effect the proper apportionment of income to the State, Oregon generally uses the Uniform Distribution of Income for Tax Purposes Act's (UDITPA) apportionment formula and definitions for business income and nonbusiness income. OR. REV. STAT. § 314.650 (1987); UDITPA §§ 9-17. In this case, the Oregon Department of Revenue challenged Pennzoil's treatment of a $2.1 billion settlement payment as "nonbusiness income." Oregon rejected the notion that tortious misconduct by an unrelated third-party, Texaco, was what gave rise to the damages awarded, subsequent entry of judgment, and ultimate settlement payment. Oregon continues to insist that a failed agreement with Getty Oil generated "business income" after four years and the conclusion of a famous lawsuit against Texaco, of which a portion is taxable by Oregon.

5. The State of Oregon's rationale appears to be: (1) Pennzoil is a multijurisdictional business with one small operation present in the State; (2) Pennzoil received a very large payment; and therefore, (3) Oregon gets some of it. Similar to New Jersey in the *Allied-Signal* case, where the State asked the Court to jettison the unitary business principle, Oregon engages in a construction of its statute that masks a policy of any distinction between operational and investment assets as artificial and worthy of being ignored. This Court wisely rejected the strained contention by the State in *Allied-Signal*, and noted instead that the relevant inquiry must focus on "the objective characteristics of the asset's use and its relation to the taxpayer and its activities within the taxing State." 504 U.S. at 785. It should similarly reject the State of Oregon's contention here.

6. Oregon summarily dismisses constitutional precedent established by this Court in *Hans Rees' Sons, Inc. v. North Carolina* ex rel. *Maxwell*, 283 U.S. 123 (1931). The Oregon Supreme Court deems the distortion doctrine in *Hans Rees* of limited value, seemingly due only to its age. But this Court validated the notion that gross distortion cannot be tolerated under the Commerce Clause as recently as 1983, when it warned the States that "we will strike down the application of an apportionment formula if . . . the income attributed to the state is in fact 'out of all appropriate proportion to the business transacted . . . in the state' or has 'led to a grossly distorted result.'" *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169-70 (1983). For the State of Oregon to ignore the rank distortion present in this case suggests that it is driven less by adherence to constitutional principles than by a desire to maximize its revenues from nondomiciliary companies.

7. Pennzoil was able to establish through separate accounting that including the amount received from Texaco in settlement in its Oregon tax base resulted in a thirteen-fold increase in Oregon taxable income. That Oregon's application of its apportionment formula would result in attributing income "out of all appropriate proportion" to the business transacted by Pennzoil in the State is not surprising, given Oregon's insistence on including income having nothing to do with anything Pennzoil did within its borders. The Court should find that there has been "an unreasonable and arbitrary application" of the State's method of apportionment, *Hans Rees*, 285 U.S. at 133, and overturn it on Commerce Clause principles.

8. Oregon is not alone in its assault on the Due Process and Commerce Clause protections afforded to multijurisdictional businesses. The numerous times this Court has been called upon to rule in this area is symptomatic of the pervasive problems faced by businesses such as Pennzoil Company. The States' defiance of precedent cannot be allowed to stand, and it certainly should not be rewarded. If

determinations similar to the one sustained by the Oregon Supreme Court are not beyond the pale of the Due Process Clause and the Commerce Clause, then just exactly what protection does the Constitution provide?

Instead of using the provisions of UDITPA to ensure a degree of uniformity among the States and operate their taxing scheme within the bounds of the Constitution, States like Oregon are wielding the language of the Act as a weapon to topple more than 100 years of constitutional jurisprudence. Such an evisceration of the unitary business principle would convert the potential for duplicative taxation into reality. *Allied-Signal*, the unitary business principle, and even UDITPA itself would be largely insignificant and all business assets, regular or extraordinary, operational or investment, would be subject to plunder.

9. This Court should affirm the vitality of the unitary business principle and hold that the Due Process Clause and Commerce Clause bar efforts to levy upon income that should not properly be taxed. With the States facing a stagnant economy, the pressure to seek additional revenue outside their respective borders is tremendous. There is no better time—indeed, no better case—for this Court to uphold the unitary business principle and the distortion doctrine. The judgment below should be reversed.

ARGUMENT

I.

This case involves the limitations on the States' power to apportion income of a nondomiciliary taxpayer where that income bears no, or only a nominal, connection with the taxpayer's activities in the State. The income involved here is the $2.1 billion Pennzoil Company and Subsidiaries (Pennzoil) received in 1988 from Texaco, Inc. (Texaco). The payment was made to Pennzoil to settle a judgment against Texaco for

tortious interference with an agreement between Pennzoil and Getty Oil Company (Getty Oil or Getty). On its tax return, Pennzoil treated this income as nonbusiness income.

Under the Commerce Clause and Due Process Clause of the Constitution, a State may not tax value earned outside its borders. *ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 315 (1982); *see* U.S. Const. art. I, § 8, cl. 3 (Commerce Clause); U.S. Const. amend. XIV, § 1 (Due Process Clause). In determining whether a particular State's taxing scheme is constitutionally valid, this Court has held that "due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Miller Bros. v. Maryland*, 347 U.S. 340, 344-45 (1954). Absent a sufficient connection or "nexus" between the State and the person, property, or transaction to be taxed, a particular levy, regardless of how it was calculated, will be struck down as violating both the Due Process Clause and the Commerce Clause. *See Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 372-73 (1991); *Mobil Oil Corp. v. Comm'r of Taxes*, 445 U.S. 425, 436-37 (1980). The State of Oregon's attempt in this case to tax income received from a transaction that had absolutely no connection to activities within its borders should fail and, accordingly, the decision below should be reversed.

A.

This is the latest in a series of cases to come to the Court on the question of what connection, or nexus, must exist between a State and a nondomiciliary taxpayer's income from out-of-state sources or activities before that income can be apportioned to, and therefore taxed by, the State. In *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), the Court confirmed that "the entire net income of a corporation, generated by interstate as well as intrastate activities, may be fairly apportioned among the States for tax purposes by formulas utilizing in-state aspects of interstate

affairs." *Id.* at 460. To effect such a "fair apportionment," the States have developed formulae to determine what part of a taxpayer's income may be properly taxed by the respective States. For example, under the Uniform Division of Income for Tax Purposes Act (UDITPA)—which the State of Oregon has adopted—the formula compares (1) the taxpayer's property, payroll, and sales (receipts) within the taxing State to (2) the taxpayer's total property, payroll, and sales. UDITPA §§ 9-17. The purpose of any apportionment formula is to assign to the taxing State the amount of taxpayer's total income that is earned in, and therefore reasonably attributable to, the State.

The general permissibility of formulary apportionment, however, must not obscure or minimize the Constitution's limitation on the States' ability to tax out-of-state income. As the Court held in *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159 (1983), "[u]nder both the Due Process and the Commerce Clauses of the Constitution, a State may not, when imposing an income-based tax, 'tax value earned outside its border.'" *Id.* at 164 (*quoting ASARCO*). Absolute consistency among taxing authorities "may just be too much to ask," but there are indisputable constitutional limits on a State's use of a given formula to tax income derived from interstate commerce.[2] In other words, although having discretion, no State has *carte blanche* in devising or applying its apportionment scheme. If the State has not "given anything for which it can ask return" in respect of the person, property, or transaction it seeks to tax, the Commerce and Due Process Clauses operate to limit the State's raw power to tax. *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940).

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[2] In evaluating challenges to state taxing schemes, the task is to examine whether the challenged tax "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

See Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 329 (1977) (the Court has a duty "to make the delicate adjustment between the national interest in free and open trade and the legitimate interest of the individual States in exercising their taxing powers").

For more than a century, the key to the Court's constitutional analysis has been the application of the unitary business principle, which focuses on whether the out-of-state item that the State is seeking to tax is "unitary" with, or functionally related to, that taxpayer's in-state activities. In *Mobil Oil*, the Court explained that "the linchpin of apportionability in the field of state income taxation is the unitary-business principle." 445 U.S. at 439 (footnote omitted). Hence, unless the unitary business principle is correctly applied, the apportionment formula employed by the State will most likely render a constitutionally impermissible result. The unitary tax principle calculates the local tax base by "first defining the scope of the 'unitary business' of which the taxed enterprise's activities in the taxing jurisdiction form one part, and then apportioning the total income of that 'unitary business' between the taxing jurisdiction and the rest of the world" based on a formula "taking into account objective measures of the corporation's activities within and without the jurisdiction." *Container Corp.*, 463 U.S. at 165.[3] If a State errs or overreaches in defining a taxpayer's unitary business—for example, by including nonapportionable items of income in or excluding apportionable items of expense from the tax base—its formula will violate constitutional norms. *See Allied-Signal*, 504 U.S. at 772-73. In

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[3] Although the terms "allocation" and "apportionment" are often used interchangeably in respect of the division of income among various jurisdictions, "allocation" properly refers to the "attribution of a particular type of income to a designated state, [and] 'apportionment' refers to the division of the tax base by formula." JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION I: CORPORATE INCOME AND FRANCHISE TAXES ¶ 9.01 (3rd ed. 1998).

Allied-Signal, the Court explained that "the unitary business rule is a recognition of two imperatives: the States' wide authority to devise formulae for an accurate assessment of a corporation's intrastate value or income and the necessary limit on the States' authority to tax value or income that cannot in fairness be attributed to the taxpayer's activities within the State." *Id.* at 780. The Court also noted, succinctly, that "there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax." *Id.* at 778.

The overarching constitutional issue in this case is whether the State of Oregon's determination that proceeds received by Pennzoil in settlement of the then largest jury award ever for tort damages is business income subject to apportionment does violence to the unitary business principle and hence contravenes the Commerce and Due Process Clauses by effectively taxing income beyond the State's constitutional reach.

B.

Oregon's corporate excise tax is imposed for the privilege of doing business in the State. Like many States, the computation starts with the corporation's federal taxable income and is modified to reflect the net income derived from or attributable to sources within the State. OR. REV. STAT. § 317.018 (1987). To promote uniform taxation of interstate businesses and effect the proper apportionment of income to the State, Oregon generally uses the UDITPA apportionment formula. OR. REV. STAT. § 314.650 (1987); UDITPA §§ 9-17. Under UDITPA and similar statutes, "business income" is apportioned among all the States in which the taxpayer does business, and "nonbusiness income" is allocated to the taxpayer's state of domicile. *See* OR. REV.

STAT. § 314.610 (1987) (App. at 16a-17a). Accordingly, the definitions of those terms are critically important.[4]

The State of Oregon uses dual tests for determining business income: the so-called transactional and functional tests. The "transactional test" is derived from the first part of the UDITPA definition of business income, the controlling factor for which is the nature of the particular transaction giving rise to the income. To constitute business income under the transactional test, the transaction and activity must be incurred in the regular course of the taxpayer's business operations. If the transaction does not meet the transactional test, the "functional test," derived from the second part of the UDITPA definition of business income, is applied. Its focus is whether conduct associated with the transaction or asset "constitute integral parts of the taxpayer's regular trade or business." *Willamette Indus., Inc. v. Dept. of Revenue*, 15 P.3d 18, 21 (Or. 2000).[5] Satisfying either test results in the

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[4] OR. REV. STAT. § 314.610(1) is almost identical to UDITPA § 1(a), which defines "business income" to mean "[i]ncome arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations." (App. at 16a-17a.) OR. REV. STAT. § 314.610(5), following UDITPA § 1(e), provides that "nonbusiness income" is "all income other than business income." (App. at 17a.)

[5] For a general discussion of the differences between the "transactional" and "functional" tests for defining "business income," see JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, *supra*, ¶¶ 9.05[2][a] through 9.05[2][c]. Although the States have discretion to adopt a definition of business (or apportionable) income that is *narrower* than the Constitution permits and although both the transactional and the functional tests can produce constitutionally acceptable results, there is no guarantee that the application of either definition in particular cases will comport with the unitary business principle and the dictates of the Court's state taxation jurisprudence. *See id.* at ¶ 9.05[1][b]. In other words, the definitions of business income and constitutionally apportionable income are similar, but not necessarily coextensive.

income's satisfying the "business" definition. In this case, the Oregon Department of Revenue challenged Pennzoil's treatment of the $2.1 billion included in its 1988 federal taxable income as "nonbusiness income" on its corresponding Oregon tax return, and assessed an additional amount of tax based on apportionment. Pennzoil appealed the assessment to the Oregon Tax Court, which affirmed. (App. at 4a.) Pennzoil challenged this result in the Supreme Court of Oregon, but to no avail. The very core of the disagreement has been over what transaction or activity resulted in Pennzoil's receipt of $2.1 billion. (App. at 6a.) Rejecting the obvious conclusion that tortious misconduct by an unrelated third party, Texaco, gave rise to the damage award, Oregon maintains that "the agreement [with Getty] gave rise to" the proceeds. (App. at 8a.) The problem with this, however, is that, thanks to Texaco, there was no agreement with Getty for Pennzoil's purchase of a minority interest in Getty. It was never consummated. It evanesced with a surprise announcement that Texaco had agreed to purchase all of Getty's stock. Yet the State of Oregon insists that this never-consummated agreement generated, after four years and the conclusion of a famous lawsuit in Texas, business income of which a portion is taxable by Oregon.

Logic plays precious little role in the State's analysis. Instead, Oregon strains to reach the conclusion that the payment by Texaco for its malfeasance toward Pennzoil is business income under the transactional test by employing, in the words of one expert, a "series of assumptions that have nothing to do with what actually did occur." (App. at 43a.)

Distilled to its very essence, the State of Oregon's analysis is quite simple: (1) Pennzoil is a multijurisdictional business with one small operation present in the State; (2) Pennzoil received a very large payment; and therefore, (3) Oregon gets some of it. There is a familiar ring to the State's argument: It mimics the cause advanced unsuccessfully by New Jersey a decade ago in the *Allied-Signal* case. To be sure, Oregon's

argument is neither so direct nor straightforward. Nevertheless, the inescapable result of allowing the Supreme Court of Oregon's decision to stand would be to permit Oregon to do indirectly what New Jersey was rebuffed for attempting to do directly. In *Allied-Signal*, the Court vivified the unitary business principle by validating the "necessary limit on the States' authority to tax value or income that cannot in fairness be attributed to the taxpayer's activities within the State." 504 U.S. at 780. There, in asking the Court to jettison the unitary business principle, the State had argued that multistate corporations regard all their holdings as asset pools and therefore any distinction between operational and investment assets is artificial and should be ignored. *Id.* at 784-85. This Court wisely rejected this strained contention, noting instead that the relevant inquiry must focus on "the objective characteristics of the asset's use and its relation to the taxpayer and its activities within the taxing State." *Id.* at 785.

II.

Oregon telegraphs its disdain for the limits placed on its ability to tax out-of-state income by the Commerce Clause and Due Process Clause by its rank dismissal of the distortion principle established by this Court in *Hans Rees' Sons, Inc. v. North Carolina* ex rel. *Maxwell*, 283 U.S. 123 (1931). To the Oregon Supreme Court, the possibility that the taxing methodology employed by a State could operate "unreasonably and arbitrarily, in attributing to [a State] a percentage of income out of all appropriate proportion to the business transacted in that state," *Hans Rees*, 283 U.S. at 135, such that it is repugnant to the Commerce Clause, is "modernly . . . of limited value." (App. at 11a n.4.)[6] Although seven

[6] Notably, the Supreme Court of Oregon's authority for the assertion that a 71-year-old decision by this Court that has never subsequently received negative treatment is now "of limited value" is a 40-year-old law review article. This Court confirmed the modern usefulness of *Hans Rees*

decades old, *Hans Rees* remains important precisely because apportionment methodologies employed in State taxing schemes admittedly are only "'rough approximation[s]' of . . . corporate income that [are] 'reasonably related to the activities conducted within the taxing state.'" *Exxon Corp. v. Dep't of Revenue*, 447 U.S. 207, 223 (1980), *quoting Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273-74 (1978). Gross distortion can occur and must be protected against. This Court described dividing income among the several States as a process that resembles "slicing a shadow." *Container Corp.*, 463 U.S. at 192. The shadow must be sliced, and it must be sliced fairly. The Court cited *Hans Rees* with approval in *Container Corp.*, a case in which the State's actions were upheld, saying:

> [A]n apportionment formula must, under both the Due Process and Commerce Clauses, be fair . . . The Constitution does not "invalidat[e] an apportionment formula whenever it *may* result in taxation of some income that did not have its source in the taxing State. . . ." Nevertheless, we will strike down the application of an apportionment formula if the taxpayer can prove "by 'clear and cogent evidence' that the income attributed to the State is in fact 'out of all appropriate proportion to the business transacted . . . in the State' or has 'led to a grossly distorted result.'"

Id. at 169-170 (citations omitted). For the State of Oregon to ignore the rank distortion in this case suggests that it is driven less by adherence to constitutional principles than by a desire to maximize its revenues from nondomiciliary companies.

Pennzoil was able to establish through separate accounting that including the amount received from Texaco in settlement in its Oregon tax base resulted in a *1,300-percent increase* in Oregon taxable income. This distortion is far greater than the

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21 years after the article was written in its opinion in *Container Corp. of Am. v. Franchise Tax Bd.*, 462 U.S. 159 (1983).

250 percent invalidated in the *Hans Rees* case or the 14 percent sustained in *Container Corp.* That Oregon's application of its apportionment formula would result in attributing income "out of all appropriate proportion" to the business transacted by Pennzoil in the State is an unavoidable consequence of Oregon's including income having nothing to do with Pennzoil's activities within its borders.

Where, as in this case, the distortion is *thirteen-fold*, the Court should find that there has been "an unreasonable and arbitrary application" of the State's method of apportionment, *Hans Rees*, 285 U.S. at 133, and overturn it on Commerce Clause principles. The Court would thereby stem the States' growing disregard of its precedents when a significant amount of revenue is at stake. To leave the Supreme Court of Oregon's decision standing, which merely winks at *Hans Rees* as it raids nondomiciliary income, would be the death knell of the distortion doctrine and, hence, undermine the unitary business principle.

III.

Oregon is not alone in its assault on the Due Process and Commerce Clauses. Taxing authorities in many States have endeavored to chip away at the unitary business principle and the constitutional limitations on state taxation as set forth in *Allied-Signal*, *Mobil Oil*, *Exxon*, *ASARCO*, *F.W. Woolworth Co. v. Taxation and Revenue Dep't of New Mexico*, 458 U.S. 354 (1982), *Container Corp.*, and earlier cases. For the States, the coin of the realm is seemingly not principle, but revenue.

Amicus TEI submits that the States' persistent defiance of precedent cannot be allowed to stand, and it certainly should not be rewarded. If these actions by the States, untethered by principle, are not beyond the pale of the Due Process Clause and the Commerce Clause, then just what protection does the Constitution provide? Alas, a decision not to hear this case might exacerbate the confusion and disparity in the manner in which business income is taxed by the States.

Stated bluntly, if this case is not overturned, the States will have proven successful in exploiting the ambiguous language of UDITPA to all but wipe away the notion of allocable nonbusiness income. The concept of nonbusiness income stems from the notion that there is income received by multistate businesses that cannot be reached by every State in which a unitary business has activity, because by its very nature, it has no relation, no requisite connection, to the activities carried on in the non-domiciliary State.

Instead of applying UDITPA to ensure a degree of uniformity among the States and operate their taxing schemes within the bounds of the Constitution, States like Oregon are wielding the language of the Act to topple more than a century of constitutional jurisprudence. The Commerce Clause and Due Process Clause stand as constitutional barriers to the States' efforts to tax extraterritorial income. *See, e.g., Allied-Signal*, 504 U.S. at 789 (striking down New Jersey's attempt to tax gain realized from a stock sale); *ASARCO*, 458 U.S. at 328 (striking down Idaho's attempt to include dividends, interest, and capital gains from a subsidiary in the parent corporation's income); *F.W. Woolworth*, 458 U.S. at 373 (striking down New Mexico's taxation of dividends received from the taxpayer's foreign subsidiary). But like sappers working to mine beneath the walls of a besieged city, the States have chipped away at the notion of nonbusiness income, weakening the constitutional protections and laying businesses bare to the ensuing sack on extra-territorial income. Such an evisceration of the unitary business principle would transmogrify the potential for duplicative taxation into shameless reality.

To prevent this result, this Court should "act as a defense against state taxes which, whether by design or inadvertence, . . . attempt to capture tax revenues that, under the theory of the tax, belong of right to other jurisdictions." *Trinova Corp.*, 498 U.S. at 386. This Court should affirm the vitality of the

unitary business principle and hold that the Due Process Clause and Commerce Clause continue to bar efforts to levy upon income that is not properly "within the reach of [the State's] taxing power." *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 80 (1938). With the States facing a stagnant economy, the pressure to seek additional revenue outside their respective borders is tremendous. There is no better time—indeed, no better case—for this Court to uphold the unitary business principle and the distortion doctrine.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for a Writ of Certiorari and reverse the decision below.

Respectfully submitted,

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